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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JIMMY LUERA, JR.,

Defendant and Appellant.

D069992, D070401

(Super. Ct. No. RIF113588)

APPEAL from an order of the Superior Court of Riverside County, Becky Lynn Dugan, Judge. Affirmed without prejudice to consideration of a subsequent petition.

Sheila O'Connor, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Allison V. Hawley, Deputy Attorneys General, for Plaintiff and Respondent.

Jimmy Luera, Jr., who was previously convicted of numerous offenses following a jury trial, is currently serving time in prison for numerous gang-related felony

convictions he suffered pursuant to a plea agreement he entered into following this court's reversal in 2010 of his prior judgment of conviction. In this second appeal, Luera challenges the trial court's postjudgment order summarily denying his petition for relief under the Safe Neighborhoods and Schools Act of 2014 (Proposition 47) and subdivision (a) of Penal Code<sup>1</sup> section 1170.18 (hereafter section 1170.18(a)). In his petition, Luera sought a reduction to a misdemeanor of his felony conviction of receiving stolen property (§ 496, subd. (a)), as well as resentencing with respect to that offense. However, he acknowledges that "a misdemeanor sentence will not affect his overall sentence [because] the two-year sentence attached to the felony stolen property count was imposed concurrently pursuant to [the] plea agreement."<sup>2</sup>

We affirm the order denying Luera's petition for resentencing on his receiving stolen property conviction because he did not meet his initial burden of submitting information or evidence showing *prima facie* that he is eligible for relief under Proposition 47. However, because the procedural requirements for petitioning for relief under Proposition 47 were unsettled when Luera filed his petition, we follow this court's dispositional approach in *People v. Sherow* (2015) 239 Cal.App.4th 875 (*Sherow*) and affirm the order without prejudice to consideration of a subsequent petition that supplies

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<sup>1</sup> All further statutory references are to the Penal Code.

<sup>2</sup> This case is from a petition for writ of habeas corpus seeking constructive filing of a notice of appeal filed in Division Two and transferred to Division One. After separate case numbers were assigned to the petition (D069992) and the appeal (D070401), this court on its own motion ordered their consolidation.

information or evidence showing prima facie his eligibility for relief under Proposition 47 with respect to his offense of receiving stolen property.

## BACKGROUND

### *Prior Appeal (Luera I)*

Following a joint trial in this case, a jury found Luera and his two codefendants,<sup>3</sup> who were all members of a criminal street gang known as Westside Riva in the Rubidoux area of Riverside County, guilty of numerous gang-related felony offenses committed in 2003 and 2005. (See *People v. Luera* (Dec. 14, 2010), D055681) [nonpub. opn. on reh'g.] (*Luera I*).<sup>4</sup> They appealed on numerous grounds, and in late 2010 we reversed their convictions on the ground the trial court committed federal constitutional error by failing to properly instruct the jury on the presumption of innocence and the prosecution's burden of proof beyond a reasonable doubt.

### *Luera's Plea Agreement and His Current Convictions and Sentence*

Later, on May 10, 2011, Luera pleaded guilty in this case to the following 11 felony offenses (counts 1-9, 15-16): assault with a deadly weapon (a metal rod) by means of force likely to produce great bodily harm (count 1: § 245, subd. (a)(1)); defacing property with graffiti (count 2: § 594, subd. (b)(1)); unlawfully carrying a firearm as a gang member (count 3: § 12031, subd. (a)(2)(C)); assault with a semiautomatic firearm (count 4: § 245, subd. (b)); unlawfully carrying a firearm (count

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<sup>3</sup> Omero Carrillo and Michael Anthony Ortega, Jr.

<sup>4</sup> This court has taken judicial notice of the record in *Luera I* on its own motion.

5: § 12031, subd. (a)(2)(f)); two counts of assault with a firearm (§ 245, subd. (a)(2); counts 6 & 8); two counts of making threats while personally using a handgun (counts 7 & 9: §§ 422, 12022, subd. (b)(1) & 1192.7, subd. (c)(23)); active participation in a criminal street gang (the Westside Rivas) (count 15: § 186.22, subd. (a)); and, of particular importance here, *receiving stolen property* (count 16: § 496, subd. (a) (hereafter section 496(a))).

Pursuant to the plea agreement, Luera also admitted allegations that he committed the offenses charged in eight of those counts (counts 1, 2, 3, 6, 7, 8, 9 & 16) for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members (§ 186.22, subd. (b) (hereafter section 186.22(b))).

The court sentenced Luera that same day to an aggregate term of nine years in state prison. As pertinent here, the court imposed a concurrent midterm of two years for Luera's count 16 conviction of receiving stolen property, plus a concurrent term of two years for the related gang enhancement.

#### *Proposition 47*

Later, on November 4, 2014, California voters passed Proposition 47, which became effective the next day. (*People v. Perkins* (2016) 244 Cal.App.4th 129, 134 (*Perkins*).) Proposition 47 "reduced the penalties for a number of offenses." (*Sherlow, supra*, 239 Cal.App.4th at p. 879.) As pertinent here, Proposition 47 "converted receipt of stolen property . . . into [a] misdemeanor[] where the value of the stolen property does not exceed \$950." (*Perkins*, at pp. 132-133, citing §§ 496(a), 490.2, subd. (a).)

"Proposition 47 also created a new resentencing provision—section 1170.18.

Under section 1170.18, a person 'currently serving' a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition to recall that sentence and request resentencing. (§ 1170.18, subd. (a).) A person who satisfies the statutory criteria shall have his or her sentence recalled and be 'resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' (*Id.*, subd. (b).)" (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1109.)

*Luera's Form Petition for Resentencing and the People's Form Response*

In late December 2014, Luera, represented by counsel, filed in the Superior Court of Riverside County a petition form<sup>5</sup> requesting resentencing under section 1170.18, subdivision (a) (hereafter section 1170.18(a)). Page 1 of the form provided a checklist of felony offenses that Proposition 47 had reclassified as misdemeanors. The box next to "Penal Code § 496(a) Receiving Stolen Property" was checked. Another box on page 1 was checked next to the statement that "[Luera] believes the value of the . . . property does not exceed \$950." Another checked box indicated that Luera was currently serving a sentence for the offense of receiving stolen property (§ 496(a)). The bottom part of page 1 stated in part, "WHEREFORE [Luera] requests that the felony sentence be recalled and that [he] be resentenced to a misdemeanor." Luera's counsel signed a

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<sup>5</sup> The petition form is titled "PETITION FOR RESENTENCING – APPLICATION FOR REDUCTION TO MISDEMEANOR (PC § 1170.18)." Next to this title, the form states: "Adopted for Mandatory Use [¶] Riverside Superior Court [¶] RI-CR039 [Rev. 11/24/14]."

statement at the bottom of page 1 beneath the statement, "I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct." Thus, the declarant was Luera's counsel, not Luera. Luera's petition did not identify the stolen property in question, and it provided no evidence or other information supporting his counsel's declaration indicating the value of the stolen property did not exceed \$950.

The People opposed Luera's petition by filing a two-page form response.<sup>6</sup> The deputy district attorney who completed the form checked a box on page 1 indicating that Luera was not entitled to the relief he was requesting because his count 16 offense of receiving stolen property was "[n]ot a qualifying felony." On the next line, beside a checked box titled "Other:," the deputy district attorney handwrote: "(+ 16. + All other include Gang enhancement." Page 2 of the form required the People to provide a proposed order. The deputy district attorney who completed the form, referring to the count 16 gang enhancement imposed under section 186.22, subdivision (b) (discussed, *ante*), requested the following order: "The 'Petition for Rehearing' is denied because no charge is a qualifying felony. Count 16 – [section] 496(a), qualifies, but it is coupled with [section] 186.22(b), making it a strike offense." The People did not submit any legal authority or argument in support of the requested proposed order.

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<sup>6</sup> The response form is titled "PETITION FOR RESENTENCING – RESPONSE AND ORDER." Next to this title, the form states: "Adopted for Mandatory Use [¶] Riverside Superior Court [¶] CRO46 [Rev. 12/04/14]."

### *Order Summarily Denying Luera's Petition*

On August 20, 2015, the court summarily denied Luera's petition.<sup>7</sup> The court signed the proposed order on page 2 of the People's response to Luera's petition. The court's separate minute order filed on that date stated, "Petition for resentencing pursuant to [Penal Code section] 1170.18 is denied." Indicating that Luera's offense of receiving stolen property (§ 496(a)) was not a "qualifying felony," it also stated that "[section] 496(a) qualifies but it is coupled with [section] 186.22(b) making it a strike offense." This appeal followed.

### DISCUSSION

Luera asserts two principal contentions in support of his claim that the court erroneously denied his petition for resentencing under section 1170.18 with respect to his count 16 felony conviction of receiving stolen property (§ 496(a)). His first and principal contention is that "section 1170.18 neither explicitly [n]or implicitly disqualifies an offense with a gang enhancement attached." Specifically, he asserts that "[n]either Proposition 47 nor section 1170.18 explicitly excludes a qualifying felony for resentencing even if a gang enhancement under section 186.22 is attached." He also asserts that "an exclusion for the gang enhancement cannot be implied" because section 1170.18 "already contains specific exceptions and exclusions."

Luera also contends that because the People, in opposing his petition, did not contest the value of the stolen property, "the People conceded that the amount of the loss

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<sup>7</sup> There is nothing in the appellate record to indicate that the court held a hearing on Luera's petition.

of the stolen property fell within the statutory limits,<sup>[8]</sup> and the court cannot now deny [his] petition on those grounds." Luera acknowledges that, although his petition "alleged that the value of the stolen property" was "less than the statutory limit of [\$950]," he "neglected to provide any further proof" of the value of that property.

Thus, Luera maintains, "[b]ecause section 1170.18 contains no exception for the gang enhancement, and his conviction under section 496 qualifies for re-designation [as a misdemeanor] and resentencing, his petition should be granted and his case remanded for further sentencing." However, as previously noted, Luera acknowledges that "a misdemeanor sentence will not affect his overall sentence as the two-year sentence attached to the felony stolen property count was imposed concurrently pursuant to a plea agreement."

In response, the Attorney General's principal argument is that the order denying Luera's petition should be affirmed because Luera, as the petitioning party, did not meet his "initial burden" of establishing that his felony conviction of receiving stolen property is now a misdemeanor. Specifically, the Attorney General argues that (1) as Luera acknowledges, his petition "merely asserted his eligibility" for resentencing "without providing any declarations or evidence regarding the value" of the stolen property; and (2) in opposing the petition, the prosecutor did not concede the value of the stolen property. Thus, the Attorney General asserts, "[b]ecause the prosecutor did not concede

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<sup>8</sup> As noted, Proposition 47 "converted receipt of stolen property . . . into [a] misdemeanor[] where the value of the stolen property does not exceed \$950." (*Perkins*, *supra*, 244 Cal.App.4th at pp. 132-133, citing §§ 496(a), 490.2, subd. (a).)

the value of the property, and because [Luera] included no evidence of value, [he] failed to meet his burden of showing his eligibility for relief."

We are aware that Luera bases his challenge to the court's denial of his petition primarily on the court's stated reasoning that his felony conviction of receiving stolen property, although an otherwise "qualifying felony," did not qualify for reduction to a misdemeanor under Proposition 47 because it was "coupled with" the related gang enhancement (§ 186.22(b)), thereby "making it a strike offense." However, "on appeal we are concerned with the correctness of the superior court's determination, not the correctness of its reasoning." (*Perkins, supra*, 244 Cal.App.4th at p. 139, citing *People v. Dawkins* (2014) 230 Cal.App.4th 991, 1004, as mod. Oct. 21, 2014, review den. Jan. 21, 2015, ["If right upon any theory of the law applicable to the case, [a decision] must be sustained regardless of the considerations which may have moved the trial court to its conclusion."].) We may affirm a trial court's judgment or order on any correct basis presented by the record whether or not the trial court relied upon it. (*Perkins*, at p. 139.)

Based on the record before us, we conclude the order denying Luera's petition for resentencing on his receiving stolen property conviction must be affirmed because he did not meet his initial burden of submitting evidence or information showing *prima facie* that he was eligible for relief under Proposition 47. In *Sherow, supra*, 239 Cal.App.4th 875, this court explained that "a petitioner for resentencing under Proposition 47 must establish his or her eligibility for such resentencing" (*id.* at p. 878), and "the *initial burden of proof* [is allocated] to the petitioner to establish the facts upon which his or her eligibility is based." (*Id.* at pp. 878, 880, italics added.) Thus, the petitioning defendant

must attach to the petition for resentencing "information or evidence necessary to enable the court to determine eligibility." (*Perkins, supra*, 244 Cal.App.4th at p. 137.) In *Perkins*, the Court of Appeal explained that, "[i]n a successful petition, the offender must set out a case for eligibility, stating and in some cases showing the offense of conviction has been reclassified as a misdemeanor and, where the offense of conviction is a theft crime reclassified based on the value of stolen property, showing the value of the property did not exceed \$950." (*Id.* at pp. 136-137, citing *Sherow, supra*, at pp. 877-878 & § 1170.18(a).)

*Perkins* is illustrative. In that case, a jury found the defendant guilty of (among other things) one felony count of receiving stolen property, and the Superior Court of Riverside County sentenced him to a consecutive term of eight months in prison on that count. (*Perkins, supra*, 244 Cal.App.4th at p. 132.) Following the passage of Proposition 47 and while he was serving his sentence, the defendant filled out and submitted to the superior court a form petition in which he requested resentencing under section 1170.18(a) on his conviction of receiving stolen property. (*Perkins*, at pp. 134-135.) The defendant checked the box for section 496(a), thereby requesting resentencing on that conviction. (*Perkins*, at p. 135.) Although the petition stated that the value of the stolen property did not exceed \$950, the defendant did not identify the stolen property, attach evidence or a declaration, or include citations to the record of conviction to support the assertion that the value of the property did not exceed \$950. (*Ibid.*) In its form response, the prosecution indicated, also without support, that the defendant was not entitled to resentencing because the value of the stolen property exceeded \$950. (*Ibid.*) The trial

court entered an order denying defendant's petition. (*Ibid.*) Although the order indicated that the defendant's conviction of receiving stolen "with losses over \$950" was not a "qualifying" offense, the court did not explain the basis of its finding that the value of the stolen property exceeded \$950. (*Ibid.*) The defendant appealed, claiming "the superior court erred in denying his petition for resentencing on the receipt of stolen property conviction because its finding that the value of the stolen property exceeded \$950 was not supported by substantial evidence." (*Id.* at p. 133.)

The Court of Appeal in *Perkins* affirmed the trial court's order denying the resentencing petition, concluding that "defendant's petition did not meet his burden of providing evidence to establish he is eligible for resentencing on his receiving stolen property conviction." (*Perkins, supra*, 244 Cal.App.4th at p. 137.) The *Perkins* court reasoned that the defendant "did not indicate anywhere on the form the *factual basis* of his claim regarding the value of the stolen property." (*Ibid.*, italics added.) Specifically, the appellate court explained that "[t]he petition provided no information whatsoever on the *nature and value of the stolen property* to aid the superior court in determining whether defendant [was] eligible for resentencing." (*Ibid.*, italics added.)

Here, as the petitioner, Luera had the initial burden of proof, which required him to provide with his petition information or evidence regarding the nature and value of the stolen property that would provide a prima facie factual basis for his claim that he was eligible under Proposition 47 for resentencing on his conviction of receiving stolen property because the value of that property did not exceed \$950. (*Sherow, supra*, 239 Cal.App.4th at p. 880; *Perkins, supra*, 244 Cal.App.4th at pp. 132-133, 137.) Luera, like

the petitioner in *Perkins*, did not meet his initial burden of proof. A box on page 1 of Luera's petition was checked next to the statement that "[Luera] believes the value of the . . . property does not exceed \$950." However, like the *Perkins* petitioner, Luera did not identify the stolen property in his petition, and he did not provide evidence or citations to the record of conviction to support his assertion that the value of the stolen property did not exceed \$950. Luera's mere assertion in his petition that he "believe[d]" the value of the property he stole did not exceed \$950 was not a prima facie showing of that *alleged* fact.

As a result of Luera's failure to meet his initial burden of proof, the burden of producing evidence regarding the value of the stolen property did not shift to the prosecution. Thus, the prosecution was not required to show in its form response that the value of the stolen property exceeded \$950, or even to contest Luera's unsupported assertion that he believed the value of the property did not exceed \$950.

For all of the foregoing reasons, we affirm the order denying Luera's petition. However, we recognize, as did the *Perkins* court in that case, that "defendant may have been misled about the requirements of petitioning for relief under Proposition 47" (*Perkins, supra*, 244 Cal.App.4th at p. 139). *Perkins* explained that "Proposition 47 is silent as to the submission of evidence or information to support an application for resentencing." (*Id.* at p. 140.) Like the petition form at issue in *Perkins*, the petition form Luera used "include[d] no space for and no directions to include evidence or information regarding the value of stolen property." (*Ibid.*) Thus, because the procedural requirements for petitioning for relief under Proposition 47 were unsettled when Luera

filed his petition, we, like the *Perkins* court, follow this court's dispositional approach in *Sherow, supra*, 239 Cal.App.4th at pages 880-881 by affirming the order without prejudice to consideration of a subsequent petition that supplies information or evidence showing prima facie Luera's eligibility for relief under Proposition 47 with respect to his conviction of receiving stolen property.

#### DISPOSITION

The order denying Luera's petition for resentencing is affirmed without prejudice to consideration of a subsequent petition that supplies information or evidence showing prima facie his eligibility for relief under Proposition 47 with respect to his conviction of receiving stolen property.

NARES, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.